

KYM L. WORTHY
PROSECUTING ATTORNEY

COUNTY OF WAYNE
OFFICE OF THE PROSECUTING ATTORNEY
DETROIT, MICHIGAN 48226

FRANK MURPHY HALL OF JUSTICE
1441 ST. ANTOINE STREET
TEL. (313) 224-5792
Fax (313) 224-8224
e-mail: tbaughma@co.wayne.mi.us.

From the Desk of
TIMOTHY A. BAUGHMAN
CHIEF, RESEARCH, TRAINING, AND APPEALS

Hon. Robert Young
Chief Justice
Michigan Supreme Court
3034 W Grand Blvd Ste 8-500
Detroit, MI 48202

Re: Administrative file 2008-36

Dear Chief Justice Young and Justices of the Court:

Proposed MCR 7.202 concerns prosecution appeals from what I would call “dispositive evidentiary rulings.” These are rulings which effectively end the prosecution’s case, but where, for whatever reason, the defense neither moves to dismiss nor does the trial court dismiss on its own motion. These are almost always cases such as the suppression of the guns or drugs in possession cases, where the case cannot proceed after the suppression of the seized items—other than by having jeopardy attach, an inevitable directed verdict entered, and appeal thereby foreclosed by principles of double jeopardy. Faced with this situation previously, the prosecutor would dismiss him or herself, and take an appeal of right from this “defensive” dismissal, relying on *Dybata v Kistler*, 140 Mich App 65 (1985) holding that a “dismissal expressly necessitated by and premised upon a dispositive evidentiary ruling” is not a “consent judgment” or order. But *People v. Richmond*, 486 Mich. 29 (2010) reh granted in part 486 Mich. 1041 (2010) changed all that, finding that in this situation the dismissal by the prosecution somehow “moots” the case (I will refrain, as counsel who lost the case, from expressing my reasons for disagreement).

When a dispositive evidentiary ruling of this sort is entered, what is clear to everyone is that the order is, in all but name, a “final order.” Indeed, one court has observed that when “the order of suppression will result in a termination and conclusion of the prosecution” in its effect, “the element of finality inherent in the order of suppression is apparent and sufficient to render the order appealable....” *Commonwealth v Bosurgi*, 190 A.2d 304, 308 (Pa, 1963). And a number of states, as well as the federal system (see 18 USC § 3731), specifically provide for prosecution appeal by right in this situation, on a certification by the prosecution that the case cannot proceed without the evidence (of course, if the appeal is *not* successful, then absent the discovery of new evidence the prosecution *may not simply reinstate the case*). Alternative A is entirely consistent with these rules, and avoids any gamesmanship by the prosecution (which never occurred in any event when *Dybata* was followed). It gives the prosecution the appeal *of right* that the legislature intended in MCL

770.12. Alternative B is certainly an improvement on the current situation, where after the ruling the trial court can (and sometimes does) then deny a stay for an interlocutory appeal, leaving the prosecutor in an impossible situation. It would provide that the “Court of Appeals shall grant a stay of proceedings at the request of the prosecutor, pending resolution of the prosecutor’s application for leave to appeal. The prosecutor must pursue the appeal as expeditiously as practicable, and the Court of Appeals shall consider the matter under the same priority as that granted to an interlocutory criminal appeal under MCR 7.213(C)(1).” I prefer Alternative A because where the evidentiary order entered is truly dispositive, the prosecutor should have an appeal *of right* under MCL 770.12, rather than being required to proceed by leave to appeal, a discretionary appeal.

Alternative A does nothing other than allow the prosecutor to appeal by right where if the trial court simply dismissed on its own motion or on defense motion following entry of precisely the same sort of suppression order—as is ordinarily the case—appeal by right by the People would unquestionably lie. This strikes me as only just, and consistent with the will of the legislature expressed in MCL 770.12.

I thank you for your consideration.

Very truly yours,

TIMOTHY A. BAUGHMAN
Chief, Research, Training, and Appeals